

No. 15973

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

---

MILDRED BECKER SCHULTZ,

*Appellant,*

*vs.*

JACK HOLMES, *et al.*,

*Appellees.*

---

Brief for Appellees Hill and Range Songs, Inc., Rumbalero Music, Inc., Broadcast Music, Inc., Decca Records, Inc., Loew's Incorporated, Radio Corporation of America, and Columbia Records, Inc.

---

GANG, KOPP & TYRE,

MILTON A. RUDIN,

PAYSON WOLFF,

6400 Sunset Boulevard,  
Los Angeles 28, California,

*Attorneys for Said Appellees.*

**FILED**

**JAN 28 1958**

**PAUL P. O'BRIEN, CLERK**



## TOPICAL INDEX

	PAGE
Jurisdiction .....	1
Statement of the case.....	2
I.	
Plaintiff's songs and the alleged infringing vehicles are dissimilar; there is no basis for plaintiff's contention that the music shows such similarity as will require an inference of copying .....	6
II.	
Plaintiff's authorities that copying may be inferred are inapplicable to the circumstances herein.....	11
III.	
Evidence of access is concededly absent; a mere "opportunity for copying" is insufficient in the case at bar.....	17
IV.	
The findings attacked by plaintiff are supported by the record herein .....	20
Conclusion .....	22

## TABLE OF AUTHORITIES CITED

CASES	PAGE
Arnstein v. Edward B. Marks Music Corporation, 82 F. 2d 275 .....	18
Arnstein v. Porter, 154 F. 2d 464.....	14
Baron v. Leo Feist, Inc., 78 Fed. Supp. 686.....	15
Blume v. Spear, 30 Fed. 629.....	11
Carew v. RKO Radio Pictures, Inc., 43 Fed. Supp. 199.....	19
Cholvin v. B. & F. Music Co., Inc., 253 F. 2d 102.....	16
College Entrance Book Co., Inc. v. Amsco Book Co., Inc., 119 F. 2d 874.....	14
Darrell v. Joe Morris Music Co., Inc., 113 F. 2d 80.....	18, 19
Edwards & Deutsch Lithographing Co. v. Boorman, 15 F. 2d 35 .....	13
Frank Shepard Co. v. Zachary P. Taylor Pub. Co., 193 Fed. 991 .....	12
General Drafting Co. v. Andrews, 37 F. 2d 54.....	12
Hartfield v. Peterson, 91 F. 2d 998.....	12
Lampert v. Hollis Music, Inc., 138 Fed. Supp. 505.....	19
List Pub. Co. v. Keller, 30 Fed. 772.....	12
Newcomb v. Young, 43 Fed. Supp. 744.....	19
O'Neill v. General Film Co., 152 N. Y. Supp. 599.....	12, 13
W. H. Anderson Co. v. Baldwin Law Pub. Co., 27 F. 2d 82....	12
Werner v. Encyclopaedia Britannica Co., 134 Fed. 831.....	11
Wilkie v. Saintly Bros., Inc., 91 F. 2d 978.....	13, 14
Withol v. Wells, 231 F. 2d 550.....	15, 16

## STATUTES

United States Code, Title 28, Sec. 1291.....	1
United States Code, Title 28, Sec. 1338(a).....	1
United States Code, Title 28, Sec. 1338(b).....	1
United States Code, Title 28, Sec. 2107.....	1

No. 15973

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

---

MILDRED BECKER SCHULTZ,

*Appellant,*

*vs.*

JACK HOLMES, *et al.*,

*Appellees.*

---

Brief for Appellees Hill and Range Songs, Inc., Rumbalero Music, Inc., Broadcast Music, Inc., Decca Records, Inc., Loew's Incorporated, Radio Corporation of America, and Columbia Records, Inc.

---

## Jurisdiction.

The Amended Complaint herein [R. 3-8] charges the defendants with copyright infringement and unfair competition, and asserts jurisdiction [R. 4] under 28 U. S. C., Sec. 1338(a) and (b). The case was tried before the United States District Court for the Southern District of California, Central Division, Honorable Thurmond Clarke, District Judge, presiding, upon said Amended Complaint and the Answers of the several defendants [R. 8-53].

Upon conclusion of the trial, Judgment [R. 61-63] was entered on January 8, 1958, that plaintiff take nothing by her Amended Complaint, and awarding judgment to defendants for costs of suit incurred. Plaintiff's Notice of Appeal was filed on February 6, 1958 [R. 64], jurisdiction of the appeal asserted under 28 U. S. C., Secs. 1291 and 2107.

### Statement of the Case.

Prior to April 7, 1941, plaintiff composed the words and music to a song entitled "Good Old Army" [R. 4, 77; Pltf. Ex. 3, Ex. Bk. 4]. She had a piano arrangement made by a professional arranger [R. 79], had about 500 copies prepared [Pltf. Ex. 3, Ex. Bk. 3-6], and in 1941 took copies to several night clubs, bars, and restaurants in San Francisco in order to "plug" the song [R. 82-90].

Counsel for plaintiff, both in his opening statement [R. 67] and in the course of trial [R. 83] conceded that these submissions to bars and night clubs did not constitute direct proof of access; indeed, at no time during the course of the trial did plaintiff present evidence or testimony of a submission of her songs to the composer of the alleged infringing vehicles, or to any of the other defendants which have published, recorded or otherwise exploited said alleged infringing vehicles.

In 1949, plaintiff rewrote her song by preparing new lyrics and rewriting some of the notes of the earlier melody to fit the words in her new version, entitled "Waitin' For My Baby" [R. 93-96]. She had about 20 copies made [R. 91], and again went to a few night clubs and similar places in San Francisco [R. 95-99], as well as to a few in Los Angeles—the receptionist in the RCA Victor Building (who may have returned the music) [R. 100], an arranger, Maxine Andrews of the Andrews Sisters (who caused the music to be returned) [R. 101], and an unidentified recording or music publishing company on Santa Monica Boulevard [R. 102].

Plaintiff first heard the alleged infringing vehicle "The Blacksmith Blues" in the summer of 1952 [R. 105].



During the trial, plaintiff sang each of her selections, "Good Old Army" [R. 81-82] and "Waitin' For My Baby" [R. 92], in their entirety, as well as passages from said compositions [R. 107-108]. The Court also heard recordings played of the alleged infringing vehicles, "The Blacksmith Blues" [R. 106], "Happy Pay Day" and "Happy Pay Off Day" [R. 107].

On cross-examination, plaintiff conceded that the claimed originality of her theme lay only in the six notes contained in the first bar [R. 114], and that these notes must appear in many places in musical literature [R. 116]. She claimed that her syncopation, or rhythmic accenting of the notes was original [R. 115], but admitted that this rhythmic beat may have been contained in the "Continental," a dance with which she was familiar [R. 119], as well as used in common dance routines utilized by performers coming on-stage [R. 122-123].

The defendants presented the testimony of 2 expert witnesses in the field of music. George G. Schneider prepared a comparison chart of the thematic material contained in the compositions in question [Deft. Ex. G, Ex. Bk. 26-29]. From this, he testified that, comparing defendants' "Blacksmith Blues" with "Good Old Army," the first measure contained five out of six notes in common [R. 157]. As to the second measure, "Good Old Army" repeats the first, whereas in "Blacksmith Blues" there is a "decided variation" [R. 157]. In bar 3, the only notes the same appeared on octave apart in the selections; bar 4 had one note in common, and bars 5, 6, 7, and 8 had none in common [R. 157-158]. Taking into consideration tempo or time values, there would be even less similarity in the selections than the chart indicates [R. 189].

Mr. Schneider testified that an old trumpet exercise by Theodore Charlier, which had been played in the courtroom, followed the melodic line of the first four bars of "Blacksmith Blues" note for note [R. 158], but that neither of plaintiff's songs followed the same sequence of notes. Referring to the same trumpet exercise, the other expert witness stated that he was "flabbergasted" to see that the exercise and "Blacksmith Blues" were almost the same tune, whereas this comparison with "Good Old Army" does not exist [R. 238-242].

Mr. Schneider also identified and played numerous public domain musical themes on the piano [R. 162-163, 167], showing that the sequence of notes in the first measure of plaintiff's songs is not new [R. 168], and that the bouncing rhythmic effect which plaintiff described as syncopation has been in musical literature for hundreds of years [R. 162].

On cross-examination, counsel for defendant attempted to extract a concession from the witness that the selections of public domain music were different from plaintiff's music in that the rhythmic timing of plaintiff's music was obtained by the use of a dotted eighth note paired with a sixteenth note, whereas other note combinations appeared in the source materials. However, Mr. Schneider testified [R. 176]:

"\* \* \* The way it is usually played, you couldn't tell whether it was an eighth note or a dotted eighth, whether it was a sixteenth rest or a dotted sixteenth rest."

The other musical expert, Mr. David Raksin, also testified that the sound of the music contained in the public domain materials is the same when played, and



that the difference in the form of the notation exists only on paper, but not in its performance [R. 231-232].

Analyzing just the first measures of "Good Old Army" and "Blacksmith Blues," respectively, David Raksin pointed out the significant differences in the two selections [R. 206-210]:

"Blacksmith Blues" contains the note A-natural which "Good Old Army" does not.

"Blacksmith Blues" has a note at the end of its first measure which carries the rhythmic impulse over into the next bar, a "carry-in," whereas "Good Old Army" does not have such a note at all.

He proceeded to play each subsequent measure of the two selections, explaining the differences between the notes, rhythm, melodic line, "intent," and structure of the plaintiff's song and the alleged infringing vehicle [R. 206-220].

Mr. Raksin also testified as to a number of public domain sources culled from standard reference works [R. 224], which utilized the same thematic material as plaintiff's composition [R. 226-232]. Some of these items not only conformed notewise to plaintiff's first bar, but rhythmically as well: "When the Saints Go Marching In" [R. 229-230], a passage from a Mozart symphony [R. 230-231], and a theme from Glück [R. 261].

In summary, the trial court heard, in their entirety, plaintiff's and defendants' music sung, played on records and on the piano. It heard the music played and compared measure by measure, and it heard numerous examples of public domain sources played and compared, both melodically and rhythmically, with plaintiff's composition.

On the basis of the foregoing the Court found that there are some notes appearing in common in the first measure of each of the respective compositions, but that this common utilization of notes occurs frequently in popular music [Finding of Fact 12; R. 58; see also R. 116, 219-220]; that there are differences in even the first measures of the respective compositions, conveying to the listener a substantially different musical sound, feeling and impression [Findings of Fact 13 and 14; R. 58-59]; and that the listener hearing performances of the selections as a whole does not receive an impression of similarity or resemblance [Finding of Fact 16; R. 59].

## I.

**Plaintiff's Songs and the Alleged Infringing Vehicles Are Dissimilar; There Is No Basis for Plaintiff's Contention That the Music Shows Such Similarity as Will Require an Inference of Copying.**

Plaintiff's basic contention is that the music showed such striking similarity as to overcome the conceded absence of any evidence of access to plaintiff's songs and to require, as a matter of law, a judgment in plaintiff's favor.

This contention is without foundation, and falls particularly at the point of its basic premise, that is, that there is a striking similarity in the plaintiff's and defendants' music.

During the course of trial, the Court heard renditions of all the selections in question, from which it concluded that the impression conveyed was not one of similarity, let alone the degree of striking similarity which might raise an inference of copying.

Comparative music charts, such as Defendants' Exhibits C [Ex. Bk. 26-29] and E [Ex. Bk. 36-37], were intro-

duced into evidence showing visually that only a random smattering of notes in the alleged infringing vehicles coincide with notes in plaintiff's songs.

Expert witness Raksin played and compared the selections measure by measure, and further demonstrated to the Court the wide discrepancies in the music. For example, measures 2 of the respective compositions show "significant differences" in rhythm, a descending musical line in "Blacksmith Blues" versus an ascending line in "Good Old Army," and the use of A-natural in "Blacksmith Blues" which does not appear in "Good Old Army" [R. 210-211]. The third measures of the two melodies had differences "so audible that it doesn't take a musician to hear them" [R. 211], and, we submit, it doesn't take a musician to see the differences in the written notes either. See also R. 212-213, in which other measures of the music were played on the piano, compared and shown to be "very clearly not the same," and to contain "no similarity that any reasonable musician could perceive."

Plaintiff's entire position is based upon the fact that the first four notes of the first measure of her compositions coincide with the first four notes of "The Blacksmith Blues," which notes are repeated in the repetition of the same musical phrase commencing in the 9th measure of the songs.

As to these four notes, both expert witnesses testified that they comprise a common musical phrase, frequently found in musical literature. Examples of the use thereof, both as to notes and rhythmic structure, were placed before the Court.

It should also be pointed out that the earlier version of "The Blacksmith Blues," entitled "Happy Pay Off

Day” [Appellant’s Op. Br. p. 5; Pltf. Ex. 8, Ex. Bk. 14], does not even contain this 4-note similarity, in the first measure or at any other point in the melodic line thereof.

Plaintiff’s contention with respect to the four-note similarity is such as to magnify its significance far out of all proportion and reason. The first four specifications of similarity (Appellant’s Op. Br. pp. 33-34) assertedly comprising a total of 26 of the claimed 39 “factors in common,” are that four notes in the first measure of “Blacksmith Blues” are similar to notes appearing in the first measure of plaintiff’s songs; that four notes in the third measure of “Blacksmith Blues” are similar to notes appearing in the first measure of plaintiff’s songs; that four notes in the fifth measure of “Blacksmith Blues” are similar to notes appearing in the first measure of plaintiff’s songs, etc.

Plaintiff’s contention that this similarity appears in bars 5, 7, and 15 of “Blacksmith Blues” is erroneous since the notes appearing therein are B-flat and D, whereas the so-called *do* and *mi* notes appearing in plaintiff’s compositions to which similarity is claimed are E-flat and G [see also, R. 244-248, in which the witness Raksin explained that the materials in bars 5, 7, 13 and 15 of “Blacksmith Blues” were modulated themes, and that these do not give the same tonal impression to the ear and mind]. This reduces the number of so-called “factors in common” to 13 instead of the claimed 26.

More important, however, is the fact that the claimed similarities do not appear in the same places in the respective selections. Only in bars one and nine (the commencement and repetition of the melodic phrases of the two selections) do the 4-note phrases correspond. Otherwise, plaintiff’s comparisons are taken wholly out of con-



text, likening a note in bar 11 of "Blacksmith Blues," for example, to a note in an entirely different portion of the plaintiff's selection.

This fatal weakness of plaintiff's argument is dramatically illustrated by specifications of claimed similarity *Sixth*, *Eighth*, and *Tenth* (Appellant's Op. Br. pp. 34-35). Item *Sixth* refers to the use of a slur (a type of musical "punctuation"—not a musical sound), in Bar 13 of "Blacksmith Blues," likened to a slur in Bar 9 of plaintiff's composition.

Item *Eighth* claims that, at the end of Bar 5 of "Blacksmith Blues" a dotted-eighth note is utilized for the note *sol*. In the first place, the note *sol* would be B-flat, and the note appearing at the end of Bar 5 of "Blacksmith Blues" is F, or *re*. In the second place, the final notes of Bars 1 and 2 of "Good Old Army" are not dotted eighth notes. However, even assuming that these two errors on one item of claimed similarity did not exist, it would be of no significance whatever that the fifth measure of one composition contained one note in common with the first and/or second measure of the other composition. A listener hears the music and derives meaning therefrom in context of the melodic line, just as a reader derives meaning from spoken or written language as used in its context. The fact that the fourth word of the lyrics of "The Blacksmith Blues" is "Kentucky" does not render those lyrics similar to those of Stephen Foster's familiar "My Old Kentucky Home," in which the word "Kentucky" appears as the eighth word. ("The sun shines bright on my old Kentucky home . . .")

Item *Tenth* claims that the fifth bar of "The Blacksmith Blues" utilizes the same rhythmic pattern as an entirely different bar or bars of plaintiff's compositions. Plain-

tiff completely rises above the fact that, not only are different measures of the respective songs involved, but also the measures which are cited contain *no common notes or musical sounds* whatever. In other words, a rhythmic pattern in plaintiff's work appears in an entirely different portion of defendants', but even there the notes or musical sounds are completely different as well.

Regarding item *Fifth*, concerning so-called "passing notes," plaintiff argues a further similarity, although even plaintiff recognizes the fact that the notes themselves are different. Contrary to plaintiff's contention, Mr. Raksin, in commenting upon the passing notes, attributed considerable importance to this difference, explaining that it showed a different "intent" and gave a different rhythmic impulse to the music [R. 209].

Accordingly, from the music itself, as well as from the analysis thereof given by the expert witnesses, it is apparent that the "factors in common" are random in nature and certainly not of a type or scope as would, as a matter of law, raise an inference that copying had taken place.

Moreover, plaintiff completely ignores the fact that note for note and measure for measure, with the exception of the four-note portion of the theme appearing in common in Bars 1 and 9, the songs are entirely different in melody, rhythm, and structure [see, *e.g.*, R. 218, 219].

Accordingly, by a comparison of the written music and of the music as performed, and on the basis of expert testimony explaining the significance thereof—ample evidence by any standard—the Court concluded that the compositions were not similar and that there was no infringement. Clearly this result is justified by the evidence, and



plaintiff's contention, that the evidence compels a finding of infringement as a matter of law, is without any basis whatever.

## II.

### Plaintiff's Authorities That Copying May Be Inferred Are Inapplicable to the Circumstances Herein.

Numerous authorities have been cited by plaintiff (Appellant's Op. Br. pp. 27-33) in support of the proposition that, in a proper case, the similarities displayed in the works of plaintiff and defendant will in themselves constitute proof that copying occurred. These authorities are inapplicable to the circumstances herein, and a comparison of the factual backgrounds in the cited cases only tends to emphasize the basic weakness of plaintiff's argument in the within action.

In *Blume v. Spear*, 30 Fed. 629 (S. D. N. Y. 1887), the entire melodic lines of the two compositions followed one another, measure for measure. Here, only two measures, the first and ninth (which is a repetition of the first in each song) display similarities. Here, "when played by a competent musician," the songs do not appear to be the same, but thoroughly different.

*Werner v. Encyclopaedia Britannica Co.*, 134 Fed. 831 (3d Cir., 1905), involved the copying of numerous articles appearing in the Encyclopaedia Britannica, to the extent that a preliminary injunction was granted. Defendants, apparently conceding similarity, contended that their articles were derived from independent sources of information; the Court stated that no evidence of such independent sources appeared in the record.

In the within action, not only was similarity not conceded, but the record discloses ample evidence of gross

dissimilarities and public domain sources available to defendants for the four-note figure appearing at the beginning of their songs. Moreover, the Charlier trumpet exercise [Deft. Ex. F, Ex. Bk. 38-39], copyrighted in 1926, follows the melodic line of defendants' music so precisely that the witness Raksin stated he was "flabbergasted" by their similarity, and the witness Schneider stated that said melodies were identical for the first four bars.

Similarly, each of the following cases cited, *List Pub. Co. v. Keller*, 30 Fed. 772 (S. D. N. Y., 1887); *Frank Shepard Co. v. Zachary P. Taylor Pub. Co.*, 193 Fed. 991 (2d Cir., 1912); *W. H. Anderson Co. v. Baldwin Law Pub. Co.*, 27 F. 2d 82 (6th Cir., 1928); *General Drafting Co. v. Andrews*, 37 F. 2d 54 (2d Cir., 1930); *Hartfield v. Peterson*, 91 F. 2d 998 (2d Cir., 1937), involved literary materials in which numerous common mistakes or misprints appeared in the alleged infringing and infringed upon works, which common mistakes could only be explained in terms of copying.

There are no such circumstances present here. The coincidence of musical notes in minor, and based upon a musical figure (the do-mi-sol triad) which plaintiff concedes (Appellant's Op. Br. p. 23) dates back at least 150 years. Moreover, the differences appearing in all measures of the compositions except 1 and 9 cannot but overwhelmingly refute any contention that copying is the only conceivable explanation for the minor similarities which do appear.

*O'Neill v. General Film Co.*, 152 N. Y. Supp. 599 (1915), involved an infringement of a dramatization of the novel "Count of Monte Cristo" by a motion picture version of the same novel. No explanation was afforded

by defendant therein for the fact that its motion picture omitted from the book over 50 of the identical characters as the plaintiff's play omitted; that scenes depicted in the motion picture were the same as those appearing in the play; and that dialogue, not appearing in the Dumas novel but spoken by the play characters, was also spoken by the characters in the screen play.

Moreover, contrary to the facts herein, there was no question of access to plaintiff's work in the *O'Neill* case; the play was a famous one which had been performed on the stage over 5,000 times.

In *Edwards & Deutsch Lithographing Co. v. Boorman*, 15 F. 2d 35 (7th Cir., 1926), which involved copyrighted interest and discount charts, there was identity in the plan, format and arrangement of the materials, which constituted the copyrightable feature of plaintiff's work. Moreover, there was no question of access involved, since defendant had been a distributor of plaintiff's work for several years prior to putting out his own work. Here, there is no identity in the works involved, and the failure of proof of access is conceded.

In *Wilkie v. Saintly Bros., Inc.*, 91 F. 2d 978 (2d Cir., 1937), findings and judgment in favor of plaintiff were rendered by the trial court, and affirmed upon appeal, on the basis of the testimony of expert witnesses who testified to the various indicia of copying in music, and who further testified that, in their judgment, the similarities in the selections could not be explained by coincidence. Precisely the reverse is the case here. Moreover, the Court, 91 F. 2d at 980, summarized the similarities in the plaintiff's and defendants' songs as including the identity of the lengthy eight-measure melodic phrase (as contrasted to a four *note* identity in the within action);

the identical use of three-bar “departure” or ending (which has no parallel in the within action); the identical use of final chords terminating each eight bar sequence (plaintiff’s claim herein is limited to melodic line only, there never having been made any contention regarding chords or harmony); and the use of an identical change in the direction of the melodies of the two compositions (the melodies in the defendants’ music herein change in a different manner than does plaintiff’s as shown by witness Raksin’s measure-by-measure comparison showing the songs to be entirely different after the first measure of each, R. 206-219).

The Court in the *Wilkie* case summed up its comparison of the two works as showing “the virtual identity of thirty-two bars,” which was virtually admitted by defendant’s witnesses. Precisely the converse is true here.

In *College Entrance Book Co., Inc. v. Amsco Book Co., Inc.*, 119 F. 2d 874 (2d Cir., 1941), there was a 96% identity of one word-list and an 82% identity of the other word-list included in two sets of booklets designed as study aids for students of French in the New York High Schools. Numerous other inexplicable similarities were present, such as common errors and peculiarities in the presentation of materials. Moreover, defendant admitted he owned copies of plaintiff’s books and used them “to some extent” in compiling his own.

*Arnstein v. Porter*, 154 F. 2d 464 (2d Cir., 1946), involved primarily the propriety of summary judgment proceedings in copyright infringement cases. The court stated that there were similarities in the music, but that “unquestionably, standing alone, they do not compel the conclusion, or permit the inference, that defendant copied.” (154 F. 2d at 469.) Similarly, the coincidental use of



a few notes in "Good Old Army" and "Blacksmith Blues" is entirely insufficient evidence to compel the court to the conclusion that the latter must necessarily have been copied from the former.

*Baron v. Leo Feist, Inc.*, 78 Fed. Supp. 686 (S. D. N. Y., 1948), involved a situation in which defendants had ample access to plaintiff's song, a Calypso tune well known for many years. More importantly, the Court characterized the infringing vehicle as "little short of identical" to plaintiff's music, from the standpoint of rhythm, construction and harmony, and mentioned the existence of an "uninterrupted sequence of identical notes" of "too great length to admit of any other inference but copying." (78 Fed. Supp. at 686.)

In contrast, in the within action, there are major discrepancies in rhythm [see, *e.g.*, R. 209, 210, 211, 214, 215-216, 218, in which the witness Raksin commented upon rhythmic differences]; construction [see R. 218-219, in which structural differences were explained]; and no claim whatever has been or could be made by plaintiff as to harmony since the copyrighted versions of plaintiff's songs [Pltf. Ex. 2, Ex. Bk. 1; Pltf. Ex. 5, Ex. Bk. 7] show melodic line only. Similarly, as hereinabove discussed (*supra*, Part I), there is no point of similarity extending more than for four notes duration, that similarity appears but twice, and otherwise the selections are highly dissimilar.

*Withol v. Wells*, 231 F. 2d 550 (1956), involved an infringement of both the lyrics and music of an ecclesiastical composition entitled "My God and I." At least 600,000 printed copies of plaintiff's work were in circulation, and the work had been performed in some three hundred churches in Chicago. Defendant, who was an

ordained minister of an interdenominational group, knew the plaintiff's work to the extent that the Court was able to find as a fact that he had committed it to memory. The defendant's work had the same title, substantially similar lyrics (*e.g.*, Plaintiff's: "My God and I, will go for aye together"; Defendant's: "My God and I will walk for aye together," 231 F. 2d at 552), and the melodies were "almost identical." Taking the soprano, alto and bass parts separately, the plaintiff contended and defendant apparently did not dispute that the infringing vehicle contained an 80.95% identity to plaintiff's soprano part, taken note for note; 69.84% identity in the alto; and 59.96% identity in the bass.

Clearly the situation in the *Withol* case is a far cry from that involved here, in which only a minor similarity occurs, and in which a note for note comparison (which is the only way the melodic lines of the compositions can be compared in context) emphasizes the overwhelming differences in melody and structure, rather than similarities. Moreover, obviously no claim is or could be made herein as to lyrics.

In *Cholvin v. B. & F. Music Co., Inc.*, 253 F. 2d 102 (7th Cir., 1958), both plaintiff's and defendant's experts testified that the two works were exactly alike to an extent of approximately 50%; plaintiff's expert further stated it would be impossible for two compositions to be so much alike without copying.

In contrast, here the experts demonstrated that the similarities were insignificant, and the Court, with the music, comparative charts, and this testimony, plus having heard renditions of the music in question, was clearly entitled to find, as it did, that the respective compositions were dissimilar.



III.

**Evidence of Access Is Concededly Absent; a Mere  
“Opportunity for Copying” Is Insufficient in the  
Case at Bar.**

Plaintiff conceded during the trial [R. 67, 83], and again in Appellant's Opening Brief, at pages 13, 20, 22, that there was no direct evidence that defendants had ever seen or heard plaintiff's music. Moreover, plaintiff conceded that the do-mi-sol triad upon which the first measures of the respective compositions are based is a common musical device (Appellant's Op. Br. p. 23), which has apparently sprung into the minds of Bach, Mozart, Stephen Foster and numerous other composers [R. 167, 226-232]. Ignoring for the sake of argument the substantial differences existing in the first measures of the respective works, as pointed out in the Statement of the Case, *supra*, it is more reasonable to assume that the same inspiration came independently to the composer of "Blacksmith Blues" than to assume that this common theme in said song was copied from an unpublished work.

Conversely, if as plaintiff contends the do-mi-sol triad theme was copied from someone, plaintiff has introduced no evidence whatever to support the contention that it was copied from "Good Old Army" or "Waitin' For My Baby," rather than from the numerous public domain sources in evidence.

Specifically we call the Court's attention to Defendants' Exhibit F, the Charlier trumpet exercise [Ex. Bk. 38-39]. When expert witness Raksin was shown this music, he stated that the similarity of melodic line for 15 measures was so great that he was "flabbergasted" [R. 238-242]. Mr. Schneider also testified to the substantial similarity between "Blacksmith Blues" and the Charlier exercise

[R. 158]. When the exercise was played on the piano, “jazzed up” or syncopated, even the plaintiff conceded that it sounded like “Blacksmith Blues” [R. 145].

It should be pointed out that the trumpet exercise is built upon the same do-mi-sol triad, and in addition, contains the natural note passing tone as in “Blacksmith Blues” rather than the flatted note as in “Good Old Army.” Said exercise also has a one-bar statement and second-bar reply, as in “Blacksmith Blues,” rather than a repetition of the first bar, as in “Good Old Army” [R. 240-242].

Plaintiff has offered no explanation for this striking similarity, nor any rebuttal against the evidence that, if “Blacksmith Blues” was inspired by another piece of music rather than independently conceived, it was inspired by said Charlier trumpet exercise, or by one of the many other public domain sources in evidence, and not by “Good Old Army.”

It is, of course, well settled that even in cases of substantial similarity, which does not exist here, there is no liability if there has been independent production.

*Arnstein v. Edward B. Marks Music Corporation*,  
82 F. 2d 275 (2d Cir., 1936);

*Darrell v. Joe Morris Music Co., Inc.*, 113 F. 2d  
80 (2d Cir., 1940):

“We have already said in *Arnstein v. Marks Music Corporation*, 2 Cir., 82 F. 2d 275, that such simple trite themes as these are likely to recur spontaneously; indeed the defendants have been able to discover

substantial equivalents of that at bar in a number of pieces which appeared earlier than the plaintiff's, and while this did not impair the copyright, it serves to fortify the judge's conclusion that the similarity did not falsify Silver's denial. It must be remembered that, while there are an enormous number of possible permutations of the musical notes of the scale, only a few are pleasing; and much fewer still suit the infantile demands of the popular ear. Recurrence is not therefore an inevitable badge of plagiarism."

Moreover, the mere distribution of copies of the music to persons having no connection or relationship with defendants is in no way probative that access actually existed.

*Lampert v. Hollis Music, Inc.*, 138 Fed. Supp. 505 (E. D. N. Y., 1956);

*Darrell v. Joe Morris Music Co., Inc.*, 113 F. 2d 80 (2d Cir., 1940);

*Carew v. RKO Radio Pictures, Inc.*, 43 Fed. Supp. 199 (S. D. Calif., 1942);

*Newcomb v. Young*, 43 Fed. Supp. 744 (S. D. N. Y., 1942).

In each of the above-cited cases, even though the respective plaintiffs had distributed copies of their respective works to prospective publishers, or other exploiters of said works, that fact alone was considered to be insufficient in view of the total absence of proof that an actual submission had been made to the defendants.

IV.

**The Findings Attacked by Plaintiff Are Supported by the Record Herein.**

Plaintiff herein has attacked numerous of the Findings of Fact of the Court below as erroneous. Each of the specifications of error is without foundation.

Regarding Finding 5, the Complaint was dismissed at the outset of the trial as to Jack Holmes, also known as Charles Douglas Hone, without any objection from counsel for plaintiff [R. 69]. Plaintiff's counsel accepted that they were one and the same man, and stated to the Court that he is dead.

The Court had before it Plaintiff's Exhibits 17 and 18, being Certificates of Copyright issued to the deceased and covering "Happy Pay Off Day," the earlier version of the alleged infringing vehicles; it had the sheet music and phonograph records [Pltf. Exs. 8, 9, 10 and 11] showing Holmes as composer of words and music to each of the alleged infringing compositions [see, *e.g.*, Pltf. Ex. 8, Ex. Bk. 13-14].

Moreover, in his opening statement [R. 66], counsel for plaintiff made the following statement:

"In 1950, a man by the name of Jack Holmes, also known as Hone, wrote two pieces of music, using what we say is the same theme, the same musical theme. One of the songs is 'Happy Pay Day' or 'Happy Pay Off Day' and the other one is 'The Blacksmith Blues.' "

Concerning the other defendants, as found in Finding 6, the Amended Complaint herein itself alleges that they

placed the alleged infringing music on the market, which allegations, insofar as the marketing of “Happy Pay Off Day” and “Blacksmith Blues” is concerned, were admitted by the various defendants [R. 10, Par. VI; R. 13, Par. III; R. 21, Par. II; R. 26, Par. II; R. 32, Par. II; R. 37, Par. II; R. 43, Par. II; R. 49, Par. II]. These verified Answers contained general allegations to the effect that said uses of “Happy Pay Off Day” and “Blacksmith Blues” were pursuant to licenses. Since the issue of liability was the only one tried, no further evidence on the questions of licenses and indemnities was deemed necessary.

Concededly, there is no evidence that any defendants obtained a license from plaintiff, but the relevance thereof would only appear if the “Happy Pay Off Day” and “Blacksmith Blues” had been found to be infringements.

All other assignments of error are based upon plaintiff’s basic contention that the similarities in the music were such as to compel a holding of infringement, as a matter of law. Since this basic premise is erroneous, as demonstrated in Parts I and II of this Brief, *supra*, we will not burden the Court with a detailed and repetitious rebuttal of each of the points raised.

Suffice it to reiterate that the differences were great and the similarities in the music were minimal, and these based upon materials abundantly found in prior musical literature. In view of this fact, it is clear that the Court was entitled to find, upon the evidence, that there was neither proof of access nor was there copying.



Conclusion.

The judgment of the District Court should be affirmed.

Respectfully submitted,

GANG, KOPP & TYRE,

MILTON A. RUDIN,

PAYSON WOLFF,

*Attorneys for Appellees, Hill and Range  
Songs, Inc., Rumbalero Music, Inc.,  
BMI Broadcast Music, Inc., Columbia  
Records, Inc., Decca Records, Inc.,  
Radio Corporation of America and  
Loew's Incorporated.*